STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 25, 2006
v	No. 259301 Oakland Circuit Court
WILLIAM A. SHELTON, Defendant-Appellant.	LC No. 2004-194961-FH

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from a bench trial conviction of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), for which he was sentenced as an habitual offender, fourth offense, MCL 769.12, to 16 months to 20 years in prison. We affirm defendant's conviction, but vacate his sentence and remand this matter for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first assigns error to the admission of a police officer's testimony regarding conversations with unknown callers to defendant's cell phone. Defendant contends that the content of the calls was hearsay, the admission of which violated his right of confrontation.

The trial court's ruling regarding the admission of evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). Likewise, when the decision involves a constitutional question, it is reviewed de novo on appeal. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000). An error in the admission of evidence in violation of the confrontation clause is not grounds for reversal if a thorough review of the record shows that "it is clear, beyond a reasonable doubt, that the . . . verdict would have been the same absent the error." *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005).

The officer testified that three callers each asked for "Will." The officer responded that he was Will, whereupon each caller "[a]sked for a 20," which the officer took to mean "an amount of narcotics equal to 20 dollars." In *People v Lucas*, 188 Mich App 554, 577-578; 470 NW2d 460 (1991), the Court held that similar requests were hearsay but were admissible as statements against penal interest under MRE 804(b)(3). In *People v Jones (On Rehearing After*

Remand), 228 Mich App 191, 207-224; 579 NW2d 82, mod on other grds 458 Mich 862 (1998), however, the Court held that utterances of this type were at most implied assertions but not statements as defined by MRE 801(a).

Assuming that the callers' requests were hearsay admissible under MRE 804(b)(3), their admission did not violate defendant's right of confrontation. Hearsay is excluded only if it is "testimonial" in nature. *Crawford v Washington*, 541 US 36, 67-68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Although the Supreme Court in *Crawford* declined "to spell out a comprehensive definition of 'testimonial,'" *id*. at 68, "the types of statements cited by the Court as testimonial share certain characteristics; all involve a declarant's knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings." *United States v Saget*, 377 F3d 223, 228 (CA 2, 2004), opinion supplemented 108 Fed App 667 (CA 2, 2004).

In this case, the officer did not question the callers; he merely identified himself as defendant. The callers, in asking for "a 20," were not giving a solemn declaration or affirmation for the purpose of proving that defendant was a drug dealer, but were expressing their own desire to buy drugs. Further, the callers did not know they were speaking to a police officer and thus had no reason to expect that their statements might be offered in future judicial proceedings. Therefore, under the guidelines offered in *Crawford*, we conclude that the callers' requests were not testimonial. See also, e.g., *People v Morgan*, 125 Cal App 4th 935, 937; 23 Cal Rptr 3d 224 (2005). In any event, any error in the admission of the evidence was undoubtedly harmless in light of the other circumstantial evidence indicating an intent to deliver. *Shepherd*, *supra*.

Defendant next assigns error to the scoring of Offense Variable (OV) 13, MCL 777.43, continuing pattern of criminal behavior. Relying on *People v McDaniel*, 256 Mich App 165; 662 NW2d 101 (2003), the trial court assessed ten points for this variable on the ground that the offense "was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property . . . " within a five-year period. MCL 777.43(c); see also MCL 777.43(2)(a). However, our Supreme Court recently concluded that "only those crimes committed during a five-year period that encompasses the sentencing offense can be considered" when scoring OV 13. See *People v Francisco*, ___ Mich. ____; ___ NW2d ___ (2006). The Court further concluded that where, as here, a scoring error alters the appropriate guidelines range, and the defendant preserved the scoring issue at sentencing, the defendant is entitled to remand for resentencing pursuant to the correct guidelines range. *Id*. at ___.

Here, the presentence information report indicates that defendant has three felony convictions for crimes against a person or property, but that none of these were incurred during the five years immediately preceding commission of the instant offense. Thus, pursuant to *Francisco*, *supra*, the trial court erred in scoring OV 13 at ten points. Moreover, because this error affects the sentencing guidelines range, we must vacate defendant's sentence and remand this matter for resentencing in accordance with the corrected guidelines range. *Id*.

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra